UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JEROME BLAKE, Petitioner, v. DONALD HOLBROOK, Respondent.	CASE NO. C14-0633-JLR-MAT REPORT AND RECOMMENDATION

INTRODUCTION

Petitioner Jerome Blake proceeds *pro se* in this habeas corpus matter pursuant to 28 U.S.C. § 2254. He is in custody pursuant to a 2011 conviction by jury verdict for First Degree Murder with a Firearm. (Dkt. 12, Ex. 1.) Snohomish County Superior Court sentenced petitioner to 380 months confinement and a term of community custody. (*Id.*)

Petitioner raises three grounds for relief in his habeas petition. (Dkt. 3.) Respondent submitted an answer to the petition, along with relevant portions of the state court record, and argues for dismissal. (Dkts. 9 & 12.)

The Court has now considered the record relevant to the grounds raised in the petition. For the reasons discussed herein, it is recommended that petitioner's habeas petition be DENIED and this case DISMISSED.

BACKGROUND

The Washington Court of Appeals described petitioner's case as follows:

> On the evening of June 22, 2010, Blake, along with Arthur Cooper and Brandon Lewis, decided to purchase OxyContin pills. Quinlin Bess, a friend of Cooper, initiated a drug deal to acquire the OxyContin on behalf of the purchasers with the help of Ivor Williams. Williams connected Bess with a seller, Marquise Brown.
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> Brown, however, schemed to surreptitiously sell OxyContin pills that could not be smoked and, thus, were less desirable as street drugs. Recognizing that problems might ensue, Brown telephoned his brother, James Baskin, and instructed him not to answer any telephone calls for the rest of the evening from Brown himself or from any telephone numbers that Baskin did not recognize. Brown then assigned to Baskin's telephone number in his cell phone the fictitious name "Mike."
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> Bess, carrying $2,400 of the purchasers' money, thereafter met with Williams and Brown. The three drove to the house of Brown's friend where the pills were stored. Bess gave Brown the $2,400 and then departed with the pills. Later in the evening, Bess realized that the pills could not be smoked. Bess reported to Cooper and Blake that the pills were "fake" and that he would try to get their money back. Bess, joined by his girlfriend, Tricia Hawthorne, then met with Brown and Williams.
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> Bess confronted Brown about the "fake" pills. In turn, Brown telephoned "Mike" in a feigned attempt to retrieve the $2,400. Brown claimed that it was "Mike" who had delivered the pills. Supposedly looking for "Mike," the group drove to a nearby park and searched the surrounding neighborhood. Blake and Cooper then joined the group, which continued to search for "Mike" in an attempt to retrieve the purchase money. Ultimately, Williams noted that tension was rising among the group. While the group was standing outside of their vehicles, Williams saw Blake put his hands under his shirt, and he heard a metallic "click-click" sound.
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> Blake began speaking with Brown. Brown, who was terrified, was on

his knees with his pockets turned out. Brown was pleading with Blake, telling Blake that he did not have his money, but that he would get it for him. Bess turned away to telephone "Mike." At this time, Blake was standing roughly 3 feet from Brown, and Cooper and Williams were standing roughly 10 feet from Brown. Blake was standing to the right of Williams. An instant later, Brown was shot, and he toppled to the ground. Williams described seeing a muzzle flash on his right side. Brown died from the gunshot wound; physical evidence later indicated that the gun was less than one foot from Brown's head when it was fired and that the path of the bullet went from the front, right side of his head to the rear, left side.

In the immediate aftermath of the shooting, Bess ran to Hawthorne's car, and they drove to Jamie Mayer's house. Bess noticed a wound on his neck that he thought resulted from the bullet skimming his neck. [Footnote 1: After later speaking with the police and being informed of the physical evidence at the scene of the shooting, Bess came to believe that the more likely cause of the wound on his neck was the shell casing as it ejected from the gun, rather than the bullet itself.] Bess and Hawthorne arrived at Mayer's house within 12 minutes of the shooting. Blake arrived shortly thereafter. When Bess saw Blake, Bess, referring to the wound on his neck, accused Blake of shooting him. Blake replied, "my bad, my bad."

Detective Kevin Allen investigated the shooting. Allen determined that at the time that Bess turned away from Brown just before the shooting, he had telephoned Baskin and left a voicemail that recorded some of the commotion that occurred around the time of the shooting. The recording included the following utterances:

> [Bess]: "Hey bro. This ain't, this ain't your little homeboy, my nigger, we seen you drive off, bro, you took somethin' that don't belong to you, my nigger, you're . . . " [Muffled noises] "Go, go, go."
> [Hawthorne]: "Who did he shoot? Why was he shooting? Who did he shoot?"
> [Bess]: "I don't know. Coop [Footnote 2: Cooper was known as "Coop."] didn't shoot nobody."
> [Hawthorne]: "Who shot?"
> [Bess]: "Just go."
> [Hawthorne]: "You did? Jay [Footnote 3: Blake was known as "Jay."] did? Did Jay?
> [Bess]: "Yes."

Br. of Appellant at 11.

> Bess and Hawthorne, fearing retaliation from Baskin, sought protection from the police. They were referred to Detective Allen. Bess told Allen that Blake was the person who had shot Brown. Bess indicated to Detective Allen that Williams was also present at the scene of the shooting. The police later interviewed Williams, who was shown a photomontage from which he also identified Blake as the shooter. Both Bess and Williams claimed to have not been looking directly toward Brown at the time of the shooting, but surmised that Blake was the shooter based on the surrounding circumstances.
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> The State thereafter charged Blake with one count of murder in the first degree with a firearm enhancement. Prior to trial, Blake moved to exclude the voice mail recording, wherein Bess identified Blake as the shooter by responding "yes" to Hawthorne's question, claiming that it was inadmissible hearsay. The trial court denied the motion, ruling that the content of the statement in the recorded message qualified as both an excited utterance and a present sense impression, and that the statement was therefore admissible.
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> The defense also sought introduction of impeachment evidence demonstrating Bess's bias (as a witness for the State). The proposed evidence concerned an occasion in which Hawthorne reported to the police domestic violence perpetrated upon her by Bess. This, according to Blake, gave Bess a motive to lie to Hawthorne when he made comments to her about the identity of the shooter. The trial court excluded the proffered evidence, ruling that it was not sufficiently relevant to any fact in issue.
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> The defense also moved pretrial to preclude any witness from offering testimony that constituted an opinion of guilt of the defendant. Blake specifically requested that Detective Allen be precluded from testifying that Hawthorne's and Bess's initial statements to the police were consistent with each other. The court granted the motion.
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> The jury found Blake guilty as charged. Blake was sentenced to a standard range sentence of 380 months of incarceration.

(Dkt. 12, Ex. 2 at 1-5.)

Petitioner filed an appeal of the judgment and sentence, arguing: (1) denial of due process when witnesses were permitted to render opinions as to guilt; (2) trial court error in admission of hearsay evidence despite the declarant's lack of personal knowledge; (3) denial of fair trial through prosecutorial misconduct; (4) trial court error in exclusion of impeachment

evidence; and (5) cumulative errors resulting in denial of fair trial. (*Id*., Ex. 3 at 1.) By order dated December 24, 2012, the Washington Court of Appeals affirmed petitioner's conviction. (*Id*., Ex. 2.)

Petitioner sought review in the Washington Supreme Court. (*Id*., Ex. 6.) He presented two issues for review: (1) "Is a defendant's right to a fair trial violated where the jury is permitted to hear a lay witness' personal belief regarding the core fact determining guilt when that witness has no personal knowledge of that particular fact?"; and (2) with regard to ER 602: "Must a party offering hearsay statement under the excited-utterance or present-sense-impression exceptions show the declarant possessed personal knowledge of the declared fact before the statement may be admitted?" (*Id*. at 1-2.) The Supreme Court denied review without comment on June 4, 2013. (*Id*., Ex. 7.) The Court of Appeals issued its mandate on June 26, 2013. (*Id*., Ex. 8.)

Petitioner did not file a personal restraint petition or other collateral challenge to his conviction.

DISCUSSION

Petitioner raises three grounds for relief:

> Ground one: Was the petitioner denied due process where witnesses were permitted to render an opinion as to his guilt?
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> Ground two: Did trial court err when it admitted hearsay evidence despite the [declarant's] lack of knowledge?
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> Ground Three: Was the petitioner denied a fair trial due to prosecutorial misconduct?

(Dkt. 3 at 5-8.)

Respondent argues petitioner properly exhausted his first ground for relief, but that his second and third grounds for relief are unexhausted and now procedurally barred and defaulted. Respondent further argues that petitioner's first ground for relief lacks merit. For the reasons set forth below, the Court agrees with respondent and recommends habeas relief be denied and this matter dismissed.

A. Exhaustion and Procedural Default

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). The exhaustion requirement "is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts," and, therefore, requires "state prisoners [to] give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

In order to provide the state courts with the requisite "opportunity" to consider his federal claims, a prisoner must "fairly present" his claims to each appropriate state court for review, including a state supreme court with powers of discretionary review. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (citing *Duncan v. Henry*, 513 U.S. 364, 365 (1995), and *O'Sullivan*, 526 U.S. at 845). *Accord James v. Borg*, 24 F.3d 20, 24 (9th Cir. 1994) (complete round of the state's established review process includes presentation of a petitioner's claims to the state's highest court). Additionally, a petitioner must "alert the state courts to the fact that he was asserting a claim under the United States Constitution." *Hiivala v. Wood*, 195 F.3d

1098, 1106 (9th Cir. 1999) (citing *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995)). "The mere similarity between a claim of state and federal error is insufficient to establish exhaustion." *Id*. (citing *Duncan*, 513 U.S. at 366). "Moreover, general appeals to broad constitutional principles, such as due process, equal protection, and the right to a fair trial, are insufficient to establish exhaustion." *Id*. (citing *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996)). A habeas petitioner must "include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief." *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996); *accord Shumway v. Payne*, 223 F.3d 982, 987-88 (9th Cir. 2000); *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999). "It is not enough that all the facts necessary to support the federal claim were before the state [court], or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (internal citations omitted).

In this case, respondent concedes and the Court agrees that petitioner properly exhausted his first ground for relief by fairly presenting the claim to the Washington Supreme Court as a federal constitutional violation. (*See* Dkt. 12, Ex. 6 at 2, 10 (asserting denial of fair trial in violation of the Sixth Amendment).) The Court further agrees with respondent that petitioner failed to exhaust his second and third grounds for relief. While raising his second claim before the Washington Supreme Court, petitioner did not present the issue in that claim as a federal constitutional violation. (*See id*. at 17-20.) He, instead, presented the claim as an error under Washington State rules of evidence. (*Id*. (arguing error under Evidence Rule 602).) Also, with respect to his third ground for relief, petitioner did not include a claim of prosecutorial misconduct in his petition for review. (*See Id*., Ex. 6.) Accordingly, petitioner failed to properly exhaust both his second and third grounds for relief.

When a petitioner fails to exhaust his state court remedies and the court to which petitioner would be required to present his claims in order to satisfy the exhaustion requirement would now find the claims to be procedurally barred, there is a procedural default for purposes of federal habeas review. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). RCW 10.73.090(1) provides that a petition for collateral attack on a judgment and sentence in a criminal case must be filed within one year after the judgment becomes final. A judgment becomes final for purposes of state collateral review on the last of the following dates: (1) the date the judgment is filed with the clerk of the trial court; (2) the date an appellate court issues its mandate disposing of a timely direct appeal; or (3) the date the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. RCW 10.73.090(3); *In re Pers. Restraint of Runyan*, 121 Wn.2d 432, 439 n.4, 853 P.2d 424 (1993).

In this case, the Washington Court of Appeals issued a mandate in petitioner's case on June 26, 2013 (Dkt. 12, Ex. 8) and there is no indication petitioner filed a petition for a writ of certiorari to the United States Supreme Court. As such, petitioner's judgment became final as of June 26, 2013, and he had until on or about June 26, 2014 to pursue collateral relief. Because petitioner did not file a personal restraint petition within that one-year time period, his unexhausted claims are now time-barred and procedurally defaulted in this Court.

When a state prisoner defaults on his federal claims in state court, pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause and prejudice, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750;

Harris v. Reed, 489 U.S. 255, 263 (1989). To establish "cause," petitioner must show that some objective factor external to the defense prevented him from complying with the state's procedural rule. *Coleman*, 501 U.S. at 753 (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). *See also Boyd v. Thompson*, 147 F.3d 1124, 1126 (9th Cir. 1998) ("Cause 'must be something external to the petitioner, something that cannot fairly be attributed to him.'") (quoting *Coleman*, 501 U.S. at 753). To show "prejudice," the petitioner "must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original). Only in an "extraordinary case" may the habeas court grant the writ without a showing of cause or prejudice to correct a "fundamental miscarriage of justice" where a constitutional violation has resulted in the conviction of a defendant who is actually innocent. *Murray*, 477 U.S. at 495-96.

Petitioner fails to set forth any basis for excusing his procedural default. Nor does petitioner present any basis for a colorable showing of actual innocence. Petitioner, therefore, fails to demonstrate that his second and third grounds for relief are eligible for review in these federal habeas proceedings.

B. Merits Review of Exhausted Ground for Relief

Federal habeas corpus relief is available only to a person "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A habeas corpus petition may be granted with respect to any claim adjudicated on the merits in state court only if the state court's decision was contrary to or involved an unreasonable application of clearly

established federal law, as determined by the United States Supreme Court. § 2254(d)(1). In addition, a habeas corpus petition may be granted if the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. § 2254(d)(2).

Under the "contrary to" clause of § 2254(d)(1), a federal habeas court may grant the writ only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Under the "unreasonable application" clause, a federal habeas court may grant the writ only if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id*. at 412-13. The Supreme Court has made clear that a state court's decision may be overturned only if the application is "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 69 (2003).

In considering a habeas petition, this Court's review "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, __ U.S. __, 131 S. Ct. 1388, 1398-1400, 1415 (2011). If a habeas petitioner challenges the determination of a factual issue by a state court, such determination shall be presumed correct, and the applicant has the burden of rebutting the presumption of correctness with clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

In his first ground for relief, petitioner avers witness testimony at trial included testimony as to his guilt and that such testimony invaded the province of the jury and deprived

him of a fair trial. (Dkt. 1-1 at 12, 19.) However, while casting his claim as a violation of the Sixth and Fourteenth Amendments, the arguments raised by petitioner in large part set forth alleged violations of state rules of evidence. (*See* Dkt. 1-2 at 12-20.) Federal habeas relief is not available for errors of state law. *Estelle v. McGuire*, 502 U.S. 62, 67-72 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.") *Cf. Walters v. McCormick*, 122 F.3d 1172, 1175 (9th Cir. 1997) ("Admission of the testimony of the child victim, K.C., is an evidentiary issue that the Montana trial court addressed under Montana law. We do not review the admission for error; 'we may only consider whether [Walters's] conviction violated constitutional norms.'") (quoting *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991)).

Nor does petitioner otherwise set forth a basis for habeas relief. "Claims of inadmissibility of evidence are cognizable in habeas corpus proceedings only when admission of the evidence violated the defendant's due process rights by rendering the proceedings fundamentally unfair." *Hamilton v. Vasquez*, 17 F.3d 1149, 1159 (9th Cir. 1994). With regard to witness testimony, the Ninth Circuit Court of Appeals has confirmed the absence of clearly established federal law supporting a constitutional violation as alleged by petitioner in this case, and as described in the excerpt of the state court decision below. That is, the United States Supreme Court has not found a constitutional violation through the admission of testimony "concerning an ultimate issue to be resolved by the trier of fact." *Moses v. Payne*, 543 F.3d 1090, 1105-06 (9th Cir. 2008) (addressing expert testimony, and stating: "That the

Supreme Court has not announced such a holding is not surprising, since it is 'well-established . . . that expert testimony concerning an ultimate issue is not per se improper.'"). *Accord Briceno v. Scribner*, 555 F.3d 1069, 1077 (9th Cir. 2009), *overruled on other grounds as stated in Emery v. Clark*, 643 F.3d 1210, 1215 (9th Cir. 2011). While a direct opinion as to guilt or innocence is not permissible, a witness "'may otherwise testify regarding even an ultimate issue to be resolved by the trier of fact.'" *Moses*, 543 F.2d at 1106 (quoting *United States v. Lockett*, 919 F.2d 585, 590 (9th Cir. 1990)).

In this case, the state court rejected petitioner's claim upon concluding that "no such impermissible opinions on guilt were offered[.]" (Dkt. 12, Ex. 2 at 5-6.) The state court reasoned:

> Evidence Rule (ER) 701 allows testimony as to "opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Similarly, ER 704 provides that "[t]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Case law establishes that the limits of ER 701 and ER 704 are exceeded when a witness testifies "in the form of an opinion regarding guilt . . . of the defendant," State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001), because such an opinion "'invad[es] the exclusive providence of the [jury].'" Demery, 144 Wn.2d at 759 (alternations in original) (quoting City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993)). However, "testimony that . . . is based on inferences from the evidence is not improper opinion testimony." Heatley, 70 Wn. App. at 578. "The fact that an opinion supports a finding of guilt . . . does not make the opinion improper." State v. Collins, 152 Wn. App. 429, 436, 216 P.3d 463 (2009).
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> A trial court's ruling on the admissibility of opinion evidence is reviewed for abuse of discretion. Demery, 144 Wn.2d at 758. Here, Detective Allen testified that both Bess and Williams identified Blake as the shooter. During direct examination by the prosecutor, Detective Allen was asked, "[T]hroughout the course of that interview, was Mr. Bess consistent on who the shooter was?" He replied, "Very. He did not waver as to who the shooter

was." Detective Allen later stated, "We knew Mr. Blake had been identified by Mr. Bess already." When asked about Williams's identification to police, the prosecutor asked, "When you showed Ivor Williams the photo array . . . what was Ivor Williams's reaction? What did he say?" The detective replied, "Immediately, he selected J.G. [Footnote 4: Blake was also known as "JG."] I don't recall exactly what he said, but he pointed to the picture and indicated that's JG, something to that very specific effect."

Later in the trial, Williams testified as to his recollection of the shooting. He was asked, "Based on the relative position of where you were, where Cooper was, where [Blake] was, who did the muzzle flash come from?" He replied, "I would say it came from [Blake] because he was on my right." He later explained:

> I didn't see the person that pulled the trigger. I saw the flash, you understand. It came from my right side. [Blake] was on my right side. I didn't see the gun. I just saw the flash, and I heard it. Instantly, when I saw the flash and heard the sound, like I told you, I took off and ran. I was already trying to make my way out of the situation anyway.

Bess's testimony was similarly based on his perceptions of the circumstances surrounding the shooting; defense counsel asked him:

> Q: Mr. Bess, I will attempt not to belabor it too much longer. To the best of your recollection, considering now all the information that you know, your observations on the night of the shooting and whatever information you learned from Detective Allen, you're saying – your testimony today that State's Exhibit 99 is your best recollection of where everybody was standing just prior to the shooting?
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> A: Yes ma'am. Yes, ma'am. But I didn't see honestly – I just heard the bang, and logically it was only one person that could have made that bang as close as they were with me. YG [Footnote 5: Brown was known as YG.] did not have a gun, and he was standing four or five feet behind me. I know he looked suspicious.
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> Q: By "he," you mean JG?
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> A: Yes.

Q: JG looked suspicious?

A: Yes.

Q: So it was based on those two things, right?

A: Yes.

Q: That JG looked suspicious and that is where they were standing, and that is why you think JG is the shooter?

A: How close he was to my head, how loud I heard the pop.

Q: You didn't actually see who the shooter was? That's just how you got to that conclusion, right?

A: Yes.

Finally, when Hawthorne took the stand, she was asked what Bess told her when he initially got into her car after the shooting. She replied, "He said [Blake] shot that boy."

Blake assigns error to the following testimony: (1) Bess's identification of Blake as the shooter to the police, which was brought into trial through Allen's testimony; (2) Bess's identification of Blake as the shooter while testifying at trial; (3) Bess's statement to Hawthorne identifying Blake as the shooter, which was brought into trial through Hawthorne's testimony; (4) Bess's exclamations in the voice mail recording, which was played for the jury; (5) Williams's identification of Blake as the shooter to the police, which was brought into trial through Detective Allen's testimony; and (6) Williams's identification of Blake as the shooter while testifying at trial.

All of the challenged testimony was based upon direct and specific observations by Bess and Williams, who were in the immediate vicinity of the shooting. The testimony was fact based: it discussed the shooting, the positions of the people at the scene, and Bess's and Williams's other observations. The descriptions of the events surrounding the shooting had a tendency to help the jury better understand what happened, thus facilitating the jury's fact-finding function. Bess's and Williams's testimony did not contain conclusory legal terms, such as "guilt" or "intent." Because the witnesses' testimony stemmed from their own sensory perceptions, the jury was free to disbelieve either or both witnesses and reach a finding of not guilty. Consequently, the testimony in question did not constitute opinions at all; rather,

the testimony was to "inferences from the evidence." Heatley, 70 Wn. App. at 578.

Nevertheless, Blake asserts that Bess's and Williams's testimony was based on their opinions. This is so, Blake contends, because "opinion evidence" means "'[e]vidence of what a witness . . . infers in regard to facts in dispute, as distinguished from his personal knowledge of the facts themselves.'" Br. of Appellant at 24 (quoting BLACK'S LAW DICTIONARY 1093 (6th ed. 1990)). By resorting to this dictionary definition, Blake seems to conflate the meanings of "opinion" and "inference" and thereby eliminate the effect of the Supreme Court's choice to include both terms in ER 701 and ER 704.

We recognize that ER 701 and ER 704 do not explicitly distinguish between "opinions" and "inferences." Nevertheless, it is clear that the Supreme Court did not consider the words to be synonyms. Indeed, there would have been no reason for the Supreme Court to have included each word in each rule if the only result was to be redundancy.

Significantly, case law does not support the contention that the challenged testimony included impermissible opinions on guilt, as opposed to allowable testimony as to inferences or fact-based observations. See, e.g., State v. Mason, 160 Wn.2d 910, 932, 162 P.3d 396 (2007) (death certificate from medical examiner admissible because based on specific observations and evidence referenced death rather than guilt); Heatley, 70 Wn. App. at 581 (testimony admissible because it was based on direct observation, was helpful to jury, and was not framed in conclusory terms that parroted a legal standard); State v. Sanders, 66 Wn. App. 380, 388-89, 832 P.2d 1326 (1992) (testimony admissible because it did not prevent jury from rejecting the testimony and finding defendant not guilty).

While we believe the challenged testimony to consist of inferences, rather than opinions, our decision is not solely based on this determination. Even were we to consider the challenged testimony to include opinion evidence, our decision would be the same. Our Supreme Court has set forth a method of determining the admissibility of challenged opinion testimony. Upon proper objection,

> the trial court must determine its admissibility. In determining whether such statements are impermissible opinion testimony, the court will consider the circumstances of the case, including the following factors: "(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of

fact."

> However, this court has held that there are some areas that are clearly inappropriate for opinion testimony in criminal trials. Among these are opinions, particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses.

State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (internal quotation marks omitted) (quoting Demery, 144 Wn.2d at 759).

The challenged testimony did not concern an opinion on Blake's intent. The challenged testimony did not concern the veracity of any witness. And the challenged testimony was not a statement of the witnesses' belief as to Blake's guilt. Thus, the challenged testimony was not of a type categorically excluded by Montgomery or Demery.

In State v. King, 167 Wn.2d 234, 219 P.3d 642 (2009), a witness's improper opinion on guilt was illustrated. In that case, a police officer testified that he had been trained on the elements of reckless driving and that King's observed conduct was within those elements. 167 Wn.2d at 330. The Supreme Court held this testimony to be an improper opinion on King's guilt. 167 Wn.2d at 331. Here, the challenged testimony was solely as to perceived facts and inferences therefrom. This was proper testimony. The testimony in no way "undermine[d the] jury's independent determination of the facts." State v. Olmedo, 112 Wn. App. 525, 531, 49 P.3d 960 (2002).

"Evidence is not improper when the testimony is not a direct comment on the defendant's guilt, is helpful to the jury, and based on inferences from the evidence." Olmedo, 112 Wn. App. at 531. In Olmedo, the defendants were charged with unlawful storage of anhydrous ammonia. This substance must be stored in containers approved by the United States Department of Transportation or otherwise meeting "federal industrial health and safety standards for holding anhydrous ammonia." 112 Wn. App. at 529. The trial court denied Olmedo's request to instruct the jury as to the definition of "a DOT 'approved' tank or identify the applicable state and federal standards." 112 Wn. App. at 530.

The court did, however, allow a witness to testify such that "'[t]he gist of his testimony indicated the propane tanks did not meet legal requirements *as he understood them*." 112 Wn. App. at 529 (emphasis added). The appellate court held that this testimony consisted of "improper opinions on the appellants' guilt." 112 Wn. App. at 532. This was because the court viewed the "testimony

> as giving improper legal conclusions." 112 Wn. App. at 532. "Improper legal conclusions include testimony that a particular law applies to the case, or testimony that the defendant's conduct violated a particular law." 112 Wn. App. at 532. [Footnote 6: The court observed that whether "the tank was approved was a core element of the charges" against the defendants. 112 Wn. App. at 532. Blake argues that this means that no testimony based on inferences can ever be admitted when that testimony is relevant to a "core element." The Olmedo court did not so hold.] Neither Bess's testimony nor Williams's testimony included any statements that constituted legal conclusions.
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> Opinion testimony concerning ultimate issues of fact is not always impermissible. Indeed "opinion testimony may not be excluded under ER 704 on the basis that it encompasses ultimate issues of fact." Heatley, 70 Wn. App. at 578-79 (emphasis added). Bess's and Williams's testimony did not constitute "expressions of personal belief," Montgomery, 163 Wn.2d at 591, merely because some of the testimony may have "encompassed ultimate issues of fact." Heatley, 70 Wn. App. at 578-79.
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> Analysis of the five factors set forth in Montgomery and Demery further supports admission of the evidence. Bess and Williams were lay witnesses, whose testimony did not carry any "special aura of reliability." Cf. King, 167 Wn.2d at 331 (police officer's testimony may carry special aura of reliability); State v. Kirkman, 159 Wn. 2d 918, 928, 155 P.3d 125 (2007) (same). The nature of the challenged testimony was that of otherwise allowable inferences drawn from facts directly perceived by the witnesses' senses. The charge was murder, arising from an assaultive act that resulted in fatal consequences, an event capable of being perceived by those at the scene. The defense in question was a general denial. The other evidence of guilt presented at trial was abundant, including Blake's veritable confession in which he stated, "my bad, my bad," when accused by Bess of shooting him as he fired at Brown. An application of the factors set forth in Montgomery and Demery in no way indicates that the trial court erred in its rulings.
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> There was no trial court error in the admission of the challenged testimony.

(*Id*. at 6-13.)

Petitioner does not demonstrate that the admission of the witness testimony at issue rendered the proceedings fundamentally unfair, or that the state court decision was contrary to

or an unreasonable application of clearly established federal law. As such, petitioner's first and only exhausted ground for relief should be denied.[1]

C. Certificate of Appealability

A petitioner seeking post-conviction relief under § 2254 may appeal a district court's dismissal of his federal habeas petition only after obtaining a certificate of appealability (COA) from a district or circuit judge. A COA may issue only where a petitioner has made "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Under this standard, the Court concludes that petitioner is not entitled to a COA with respect to his claims.

CONCLUSION

The Court recommends the habeas petition be DENIED, and this case DISMISSED. An evidentiary hearing is not required as the record conclusively shows that petitioner is not entitled to relief. A proposed Order accompanies this Report and Recommendation.

1 Although unexhausted, the Court also herein addresses respondent's alternative argument that petitioner's second ground for relief, even if not procedurally barred, is not cognizable in this habeas proceeding. *See* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.") As noted by respondent, petitioner's second ground relief raises only issues of state evidentiary law, specifically, the state rule of evidence regarding hearsay. (*See* Dkt. 1-2 at 10, 20-21.) Accordingly, even if properly exhausted, petitioner would not be entitled to habeas relief in relation to this claim. *See Estelle*, 502 U.S. at 67-72.

DATED this 29th day of August, 2014.

Mary Alice Theiler
Chief United States Magistrate Judge